WESTERN AGGREGATES OF MINERAL & ROCK, INC.

IBLA 71-268 Decided September 26, 1972

Appeal from a decision (W-26903) by the Wyoming land office rejecting an application for a tramroad (railroad) right-of-way.

Affirmed.

Rights-of-Way: Act of January 21, 1895

The rejection of an application for a tramroad (railroad) right-of-way filed pursuant to the Act of January 21, 1895, will be affirmed where the applicant fails to show how it is needed in any present mining or quarrying operation.

APPEARANCES: Robert C. LeFaivre, President and General Manager.

OPINION BY MR. RITVO

Western Aggregates of Mineral & Rock, Inc., has appealed to the Secretary of the Interior from a decision by the Wyoming land office dated March 23, 1971, rejecting its application W-26903 for a railroad right-of-way filed pursuant to the Act of January 21, 1895, 43 U.S.C. § 956 (1970).

The application submitted by the appellant represents its third effort to obtain a railroad right-of-way over public land in sec. 16, T. 18 N., R. 107 W., 6th P.M., Sweetwater County, Wyoming.

The Act of January 21, 1895, supra, authorizes the Secretary of the Interior to permit the use of a right-of-way across public lands for a tramroad 1/ by any citizen engaged in the business of mining and quarrying (and for other purposes not material here).

1/ The pertinent regulation defines a tramroad as including" . . . railroads . . . to be used in connection with mining, quarrying, logging, and the manufacture of lumber." 43 CFR 2811.0-5.

So far as the record reveals, the appellant is, or has been engaged in, the operation of a gravel pit on lands owned by the Union Pacific Railroad in sec. 9, which abuts sec. 16, to the north, and is attempting to develop a commercial and industrial use area on 5 acres of public land in sec. 16 adjacent to the requested right-of-way. Western Aggregates states that "The primary purpose of this right-of-way is transportation of product, sales, and service."

Western Aggregates' proposed railroad spur would give direct access from the company's rock and ore operations to the main Union Pacific line. At present the closest railroad loading facilities are located three miles from appellant's place of business. Appellant contends that the distance and outmoded loading ramp make these loading facilities inadequate for the volume type loading it employs in its business.

The appellant's initial application for a railroad right-of-way (W-18615) was filed on March 26, 1969, pursuant to the Act of January 21, 1895. Following rejection on July 14, 1969, of its first application, Western Aggregates refiled on October 16, 1969 (W-21524). The second application was for the identical tract of land. The land office rejected the appellant's application on December 30, 1969. Western Aggregates was notified by the land office that the application was rejected for the following reasons:

> 1. Railroad loading facilities are available in Green River, only three miles from your place of business in the area.
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> 2. You already have adequate road rights-of-way into your business area, and further rights-of-way seem neither practical nor necessary.
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> 3. The Union Pacific Railroad Company has informed us that they will allow only one tie in switch to be placed on their main-line track, not two as you propose.
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> 4. You have been unable to complete your proposed development of your business site in the area during the six years that your occupancy of it was authorized under the Small Tract Act. This failure appears to constitute either a lack of good faith or lack of financial means to develop the area further.
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> 5. The Sweetwater County Planning Commission recommended that the land crossed by the proposed right-of-way be zoned for industrial purposes, and the town of Green River has filed an application to purchase adjoining land proposed for similar

> zoning. (The E 1/2 of sec. 16). It would not be in the public interest to encumber this area with additional rights-of-way until local planning and development proposals for the area have been completed, a process which is expected to take some time.

The decision of the land office was affirmed by the Office of Appeals and Hearings, Bureau of Land Management, on March 26, 1970, on the grounds that since the second application made no showing of any change in conditions from the initial rejection of W-18615, the issue was res judicata and that, in any event, merely filing a new application without a showing of changed condition would not merit overruling a prior decision.

The present application was filed with the Wyoming land office on December 8, 1970. In this third filing the appellant had made some changes from the first two applications regarding the routing of the spur trackage. The location, however, for all practical purposes remains basically the same as in the previous applications. After review of the facts presented, the land office again rejected the appellant's application in a decision dated March 23, 1971. In partially adopting the reasons given in the previous W-21524 application decision the land office rejected the application on the following grounds:

> 1. Railroad loading facilities are available in Green River only three miles from the area of your application.
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> 2. The Bureau of Land Management has granted you road rights-of-way into and through section 16 and further rights-of-way seem neither practical or necessary.
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> 3. Your gravel lease agreement with the Union Pacific Railroad Company in section 9, T. 18 N., R. 107 W., which the proposed railroad spur line would serve was terminated as of November 20, 1970.
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> 4. You do not possess a mineral material sale contract with the United States on the lands within section 16, T. 18 N., R. 107 W., through which the proposed railroad spur traverses. On this particular section of land the United States controls the fee estate while the State of Wyoming owns the mineral estate, excluding the sand and gravel.
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> 5. Although you do possess a "Metallic and Non Metallic Rocks and Minerals Mining Lease" from

> the State of Wyoming, the lease is limited to gold and stone and excludes sand and gravel and crushed rock for aggregate.
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> 6. As a result of the Board of Land Appeals decision issued December 8, 1970, your Small Tract lease for a business site (serials numbers W-0205965 and W-18668) which closely adjoins the proposed right-of-way has been terminated. Your inability to accomplish the development of the small tract area during the past 7 years of occupancy would indicate a lack of financial means to develop the area further.

Appeal was taken by Western Aggregates on April 21, 1971. In its appeal, Western Aggregates attempts to refute each basis of the land office's decision. First, the distance of three miles is challenged as being too far, forcing the company to incur excessive expenses. Secondly, the fact that it has vehicular road rights-of-way does not supplant its need for rail facilities.

Third, the contract with the Union Pacific was not renewed since Union Pacific is also a competitor in supplying material to prominent users of aggregates.

It then denies that the United States has any rights to minerals in section 16 and asserts that it has mining claims for an uncommon variety of sand and gravel. Further, it asserts that it can remove stone under its state lease, and that crushed stone and gold recovery are inherent in each other. Finally it says it has located a mill site claim on the land formerly included in its small tract leases. 2/

Despite its wide ranging assertions, the appellant has not shown any existing mining or quarrying business for whose

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2/ Section 16, which was originally granted to the State of Wyoming, was reconveyed to the United States with a reservation of minerals. Western Aggregates holds a lease from Wyoming granting it the exclusive right to mine and remove all minerals "except oil and gas, coal, oil shale, bentonite, and sand and gravel and crushed rock for aggregate," and with the further restriction that in the "E 1/2; E 1/2 NW 1/4" its rights are "limited to gold and stone." The right-of-way lies in lots 3 and 6 which constitute the E 1/2 NW 1/4. As to whether the United States or the State owns the sand and gravel, see United States v. Isbell Construction Company, 78 I.D. 385 (1971).

operations it requires the railroad right-of-way, even assuming it can eventually establish a right to remove sand and gravel or crushed rock from any part of sec. 16. As the land office found, the appellant has not demonstrated any compelling need for the proposed right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Martin Ritvo
Member

We concur:

Newton Frishberg
Chairman

Anne Poindexter Lewis
Member